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Supreme Court of the United States

OCTOBER TERM, 1948

No. 51

51

RAILWAY EXPRESS AGENCY, INC., CHARLES GERCHARIO and others,

Appellants,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

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No. 51

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

This is an appeal pursuant to Judicial Code § 237 from a final judgment of the New York Court of Appeals sustaining, by a vote of four judges to three, the validity of § 124 of the Traffic Regulations promulgated by the Police Commissioner of the City of New York, which prohibits "advertising vehicles" and which appellants attacked as unconstitutional in its application.

Opinions Below

The opinions of the City Magistrates (R. 69, 76) are not reported. The opinion of the Court of Special Sessions, City of New York (R. 82-5), is reported unofficially in 67 NYS 2d 732. The memorandum decision of the Court of Appeals (R. 107-8) is reported in 297 NY 703, the minority's grounds of dissent being at 705.

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code § 237(a), 28 USC § 344 as amended. The Court of Appeals in sustaining Traffic Regulations § 124 necessarily passed upon questions under the Federal Constitution, viz. whether § 124 is repugnant to the Fourteenth Amendment and to Article I § 8 of the United States Constitution, and determined those questions in the negative (amended remittitur, R. 112). On February 16 1948 the New York Court of Appeals allowed appeals to this Court from the final judgment of affirmance (R. 121-2), and on June 21 1948 this Court noted probable jurisdiction (R. 141). The grounds of jurisdiction appear in full in the Statement as to Jurisdiction filed with the New York Court of Appeals and docketed herein, October Term 1947 No. 786.

Statement of the Case

The judgment appealed from affirms convictions in criminal proceedings upon various summonses issued against Railway Express Agency, Inc. and 13 drivers of its delivery trucks. Appellants were found guilty of operating advertising vehicles contrary to the Traffic Regulations made by the New York City Police Commissioner, which provide in material part:

> "§ 124. *Advertising vehicles.*
>
> No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner

and not used merely or mainly for advertising" (Quoted at R. 38, 82; Appendix A, p. 34 of Statement as to Jurisdiction).

Railway Express Agency, Inc. is a Delaware corporation organized December 6 1928 and authorized since January 22 1929 to do business in the State of New York (R. 38, 87). It is engaged, among other activities, in a nationwide express transportation business operating throughout the United States some 14,500 motor delivery trucks (R. 60-1), about 1,900 of which run within the City of New York (R. 52) and in part to New Jersey railheads (R. 48). These 1,900 trucks carry shipments of which at least 80% move between States (R. 53).

Under broad charter powers (R. 97-100) Railway Express has since 1930 displayed advertising on the sides of its motor delivery trucks, both those moving exclusively within New York City and those moving between New York and New Jersey (R. 104-6). At the present time such advertising appears on the delivery trucks of Railway Express in various parts of the United States pursuant to a nationwide contract with an advertising agency which brings substantial revenue (R. 105-6).

While concededly within the charter power of the corporate appellant, this advertising is displayed by it strictly as an incident to the transportation of merchandise. The record is clear and uncontradicted that Railway Express never sends its trucks through the streets merely or mainly to exhibit advertising (R. 50). They move exclusively to carry merchandise (R. 62). Those trucks carrying the advertising in respect of which these convictions were had were transporting goods at the time in the regular course of appellant's business (R. 55, 59, 72).

Railway Express in the course of its business in New York City carries the greatest diversity of goods including luggage, clothing, movie film, tobacco, stage scenery, food, circus equipment, munitions, etc. which arrive from all parts of the country and proceed to all parts of the country (R. 48-50, 59, 64). The advertising in question is depicted in photographs marked Exhibits 3-8 (R. 91-6); it consisted of paper posters of dimensions from three by seven feet to four by ten feet (R. 7-8) pasted to the sides of the trucks and portraying specified motion pictures, a circus, cigarettes, tobacco, a radio station (R. 40-2). One summons describes the truck in respect of which a conviction was had as advertising on one side a tobacco and on the other side a call for women recruits by the U. S. Navy (R. 22.)[1] All the 1,900 trucks operated by Railway Express in New York and between New York and New Jersey bear advertisements on their sides (R. 52), but some of the placards advertise the business of the company itself (R. 62) and others advertise such matters as War Loans and the Red Cross (R. 52).[2] As shown by the photographs, all the advertising complained of is in the form of framed posters well within the area of the side walls of the delivery trucks.

No complaint was made below, and there are no adverse findings, with respect to the quality, color, size or design of the advertising here involved. It is clear and undisputed that corporate authority exists on the part of Rail-

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[1]This asserted obstruction to traffic said: "Women the Waves need you". R. 22.

[2]The answers with respect to the Seventh War Loan and the Red Cross were stricken on objection of the prosecution, but it is submitted that this exclusion of evidence was erroneous and that this Court may have regard to evidence wrongfully excluded in passing upon questions properly here.

way Express to do any lawful business which might seem to its board of directors appropriate to be carried on in connection with transportation and that the board expressly sanctioned and approved the display of advertisements for revenue (R. 100, 105-6).

The convictions were predicated on the theory that the New York City traffic regulation in question "was intended to prohibit the type of advertising" in which Railway Express was engaged and that the advertisements had "nothing to do with the business of the persons owning the vehicle making deliveries" (R. 69, 76). The Magistrates' Courts thus adopted in their construction the application of the regulation embodied by the prosecution in the charge and questions to witnesses (R. 39):

> "Did you see any signs on that truck *advertising anything other than Railway Express Agency, Inc.?*" (italics supplied; also R. 41, 73; returns at R. 7, 8 and 10; summons at R. 30; charge at R. 34-5).

The New York appellate courts dealt with the meaning of the regulation, the powers of the Police Commissioner under the City Charter, and the constitutionality of the regulation as applied, but did not change the construction put upon it by the prosecution and the magistrates, viz. that it prohibits Railway Express from displaying notices of the products of others but does not prohibit the display of advertisements of Railway Express itself even though identical in every other respect with the prohibited advertising.

The question for this Court is therefore the constitutional validity of a police regulation which under color of regulating the traffic of delivery trucks necessarily moving in the transport of merchandise, prohibits as advertising

the display of business notices of others, but permits as business notices the advertisements of the truck owner.

Specification of Errors to be Urged

Pursuant to the assignment of errors (R. 120) appellants urge

1. That as construed and applied Traffic Regulations § 124 is so unrelated to traffic control as to deprive appellants of liberty and property without due process of law and deny them the equal protection of the laws in contravention of the Fourteenth Amendment.

2. That as construed and applied Traffic Regulations § 124 places an undue burden upon interstate commerce in contravention of Article I § 8 of the Constitution.

Point I

SECTION 124, AS CONSTRUED AND APPLIED BELOW, DEPRIVES APPELLANTS OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In our submission the unconstitutionality of the traffic regulation in question was correctly announced by the Chief Judge and the two other dissenting Judges of the New York Court of Appeals in their statement (297 NY at 705)

> ". . . that this regulation of the police commissioner as interpreted to forbid these unobjectionable advertisements on defendants' trucks, is so entirely unrelated to traffic control as to be arbitrary as matter of law."

It is important to note at the outset that Traffic Regulations § 124 must stand or fall upon its propriety as an exercise of the Police Commissioner's power to control traffic.[3] Although taken over by the Commissioner from a repealed City ordinance running back in slightly different form to 1882 (respondent's brief in the Court of Appeals p. 6), the regulation in question was promulgated, on February 4 1938, under authority derived exclusively from § 435 of the New York City Charter, adopted by referendum and effective January 1 1938.[4] Section 435 is the only provision in which the New York legislature has delegated to an administrative city officer the power to adopt rules and regulations for the conduct of traffic. *Bus Depot Holding Corp. v. Valentine*, 288 NY 115, 120. It is, therefore, the sole and the exclusive source of power in the Police Commissioner to promulgate § 124, a fact which not only gives

[3]Differing in this respect from the substantially similar language which was involved in the prior decision of this Court, *Fifth Avenue Coach Company* v. *City of New York*, 221 US 467 (1911), discussed at p. 18 below, and which was embodied in a *City ordinance*.

[4]Charter § 435 provides in material part:

> "The police department and force shall have the power and it shall be their duty to . . . *regulate, direct, control and restrict the movement of vehicular and pedestrian traffic* for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; . . . The commissioner shall make such rules and regulations for the *conduct of pedestrian and vehicular traffic* in the use of the public streets, squares and avenues as he may deem necessary which shall not become effective until filed with the city clerk and published in the City Record. The violation of such rules and regulations shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both." (Italics supplied.)

force to the regulation within its proper limits but determines those limits. Clearly § 124 must stand or fall as a *regulation of traffic*.

These appeals, therefore, present the constitutional question in the context of traffic control; they bring up no question as to the appropriate exercise of municipal legislative power, which in New York City resides exclusively in the City Council and includes the "power to adopt and amend local laws . . . in respect to the care, management and use of its streets and property". The Court is not here asked to determine the constitutionality of a local law representing exercise of the municipal legislative authority. It is not claimed, as we understand, that the Police Commissioner has the broad legislative control over the use of the public streets which has been vested exclusively in the City Council.[5]

That the Commissioner assumed to exercise, in Traffic Regulations § 124, only the limited administrative function of regulating the conduct of vehicular traffic in the use of the public streets, with a view to facilitating the movement of traffic, promoting public convenience, and safeguarding life and health, appears from the context in which § 124 is

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[5]New York City Charter §21 provides: "The council shall be vested with the legislative power of the city, and shall be the local legislative body of the city, with the sole power to adopt local laws under the provisions of the city home rule law or otherwise . . ." See also New York Constitution Art. IX § 16; City Home Rule Law Art. II § 11.

In this respect again the present appeal differs from the question presented to this Court with respect to the meaning and application of a municipal *ordinance* containing substantially similar language in *Fifth Avenue Coach Company* v. *City of New York*, 221 US 467.

found.[6] This is one of five sections comprising Article IX of the Traffic Regulations. The caption of Article IX is *Obstructions*. In addition to advertising vehicles (§ 124) it deals with stopping vehicles on cross-walks or intersections, placing vehicles cross-wise on streets, the use of streets traversed by surface cars, occupation of streets by vehicles in obstruction of traffic, retarding traffic by slow speed, entering intersections obstructed by traffic, and backing into curbs. This surrounding subject-matter indicates that § 124 was intended only to exclude from the streets vehicles circulating solely for purposes of display, such as the empty wagon advertising a tailor and drawn along Madison Avenue by two burros or the truck carrying through the Brooklyn streets placards emblazoned with the particulars of a labor dispute.[7] In the former case the magistrate said correctly enough that "the peculiar character of the vehicle used stamps it as an advertising vehicle and the testimony shows that on all three occasions the wagon was not engaged in the business of the owner, but was merely used as an advertising medium, for the officer found no merchandise of any character in the interior" (39 NYS 2d at 239).

The dealing with this kind of obstruction to traffic would seem to have been the primary purpose, and we submit the only proper purpose, of the Traffic Regulation here at bar. But in the absence of any definition in the Regula-

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[6] Appendix A to the Statement as to Jurisdiction, being a printed pamphlet attached to the statement as filed, contains the Traffic Regulations of New York City.

[7] *People* v. *Berkowitz*, 39 NYS 2d 236 (1943); *People* v. *Hopkins*, 147 Misc. 12 (1933). In the *Hopkins* case the posters on the empty truck bore a notice of reward by the A. F. of L. for the arrest and conviction of bomb throwers and carried further notices such as "We stand for decency in unionism Local 306 is now picketing the Patio and Albemarle".

tions themselves of the key words "advertising vehicle" and "business notices", the prohibition of § 124 has been extended so as to exclude from the city streets *even vehicles necessarily moving thereon in the carriage of goods* when they exhibit notices of the products of others, on the theory that these too are advertising vehicles, while at the same time the interpretation thus judicially sanctioned below would permit the same vehicles to display notices of the identical size and form concerning the products of the owner. It is this unwarranted discrimination, wholly lacking in reasonable basis and unrelated to traffic control, which we contend to be arbitrary as a matter of law.

If by virtue of the advertising the Railway Express delivery trucks obstructed traffic, a conviction could be obtained under Traffic Regulations § 121.[8]. If the Railway Express delivery trucks were driven for purposes of incidental display at such a slow speed as to retard traffic, a conviction could be had under § 122.[8] If the operation of the trucks with the advertisements attached constituted dangerous driving in any respect, a conviction could be had under § 20.[8] But the imprisonment or fining of the appellants for these violations would have required the prosecution to establish the facts constituting the crime. By the enlarged interpretation which the New York courts have placed on § 124, they have wrenched it out of the formula of traffic control and made violation turn on the single irrelevant question whether the merchandise advertised on the side of any vehicle engaged in carrying goods through the streets is the product of the owner or of another.

In that way § 124 is transformed from a measure regulating and controlling the movement of vehicles into the

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[8]These provisions are printed in Exhibit A, p. 19, of the Statement as to Jurisdiction filed herein.

prohibition of a business not inherently vicious, and indeed universally recognized as legitimate. By § 124 as construed below, the Police Commissioner will have destroyed the business of vehicular advertising in the City of New York, even though the legislative body of the city has not declared such destruction to be its public policy. Section 124 as construed is the only regulation of advertising attempted to be made in the exercise of administrative functions. All others have been by local laws duly enacted by the municipal legislature subject to the approval of the Mayor. Thus the New York City Administrative Code contains extensive provisions as to the erection and maintenance of signs on buildings, "sign" being defined to include "an advertisement" and special provisions governing "illuminated signs".[9] Illuminated signs are permitted if they conform to regulations prescribed in the Administrative Code.

There ensues under these official permissions, as the Court will judicially notice, publicity which is stupefying in its effect. Illuminated signs of prodigious size and brightness and varied color surround Times Square with visions exceeding any dream of De Quincey. At the moment one advertises a clothier by means of a giant and giantess lightly draped and flanking a Niagara of water, another proclaims a beer with a scintillant railway train running through hot and thirsty badlands such as even Dante could not have imagined, a third seeks customers for the film version of Joan of Arc's life with a concourse of personages so furiously hued as to renew the martyrdom of that saint. This clamor of electric light and movement around Times Square, constituting Broadway the "Great White Way", permitted

[9] L. 1937 ch. 929, § B26-1.0 to B26-19.0.

and governed by the Administrative Code, enormously increases the swarm of pedestrians and vehicles attracted nightly into this area and tends to make it one of the most densely congested districts in the world. And, as the Court will judicially notice, electric signs of every size and type are scattered in profusion in all the business streets of not only New York but every American city. The modest non-illuminated advertising represented by the exhibits in evidence here of course does not approach these illuminated signs in power to distract and command attention or in tendency to cause congestion of traffic.

As distinguished from the illuminated signs licensed by New York City, stationary and non-illuminated advertising goes without regulation in the City of New York, except for a prohibition of the posting of handbills or other advertisements upon curbs and other objects in the streets.[10] The number of non-illuminated signs at eye level, each claiming the attention of the passer-by, must in New York run high in the hundreds of thousands. Strangely enough, one of the most distracting of all forms of publicity is sanctioned under license from the Police Commissioner; for the Administrative Code especially provides for aircraft towing banners over the city *under official license* and bars only within a one-mile radius of outdoor assemblages aircraft "engaged in advertising".[11] It is not suggested that the aerial advertising so authorized is a traffic hazard.

Compared with the electric signs and the sky-advertising recognized by the municipal legislature and sanctioned under license, the advertising posters in the case at bar are indeed "wholly unobjectionable", as was said by the dissenting

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[10]New York Administrative Code § 82D 7-1.0.

[11]Administrative Code §§ 436-4.0 and 436-4.1.

Judges in the Court of Appeals. The majority in the Court of Appeals, the Appellate Part of Special Sessions, and the magistrates who found appellants guilty did not say the contrary. They found only that the Railway Express delivery trucks were "advertising vehicles" because they carried unobjectionable notices describing the products of others rather than "business notices" of Railway Express. This extension by interpretation of § 124[12] was a denial to appellants of due process and the equal protection of the laws.

1. *Due Process of Law.* Prohibition of the advertising conducted by appellants as a mere incident to their permitted activity of transporting merchandise is an abuse of the police power and an arbitrary act entirely lacking in any relationship to traffic control. It is clear that the delivery trucks in respect of which the summonses were served would have operated in the same manner whether or not they carried any notices whatever. It is clear too that they burdened traffic no more and no less by virtue of the advertising prohibited under the interpretation below than they would by

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[12]Not until service in December 1944 of the flurry of summonses leading up to the judgment under review was any serious effort made by the City to enforce this interpretation of the Regulation or the preceding municipal ordinance, notwithstanding the display of advertising by Railway Express in New York in substantially the same manner since 1930. In 1938 a City magistrate held the corporate appellant's truck advertising to be a violation of § 124. *People* v. *Kearns*, 168 Misc. 264. However, no attempt was made until 1944 to enforce this extended construction of § 124. In 1932 another magistrate had held the Railway Express advertising not to be a violation (opinion unreported but described in 168 Misc. at 265). Substantially the same language has been held by the Supreme Court of Nebraska and by a Hartford (Conn.) Police Court to permit vehicular advertising. *State* v. *Hind*, 143 Neb. 479, 10 NW 2d 258 (1943); *State of Connecticut* v. *Cody* (Hartford Police Court 1946; unreported).

virtue of the "business notices" expressly authorized by § 124. No proof was offered to show that, if all the advertising posters of Railway Express were removed, the number of trucks now being operated by it would be reduced, or that they would be operated at a different speed, or that the streets now used would not be used, or that the fixed delivery routes now followed would be affected in any degree. On the contrary, the uncontradicted testimony is that the number of the vehicles and the direction of their movement are dictated exclusively by the amount and destination of the cargoes to be delivered (R. 48-50, 62). There is no contention that the posters in themselves are an obstruction to traffic, affixed as they are flat against the sides of the delivery trucks.

Although some of the trucks involved were found by the arresting officers in busy and congested districts, such as East 34th Street and the like (R. 7-8, 14, 30) in the middle of the day (R. 34-5), the photographic evidence completely negatives any theory of congestion being caused by the display; see Ex. 3-8, R. 91-6. The vehicles of appellants placarded with advertising are visibly engaged in their regular routine of taking and making deliveries without any greater or other effect upon the public convenience than the thousands of non-advertising cars, trucks, buses and other vehicles which ply the streets every day and—without any different or other effect than if they had carried permissible "business notices" only instead of the advertising in question.[13] The record contains no evidence whatever that

[13]It is of interest that a careful study of New York City traffic control, submitted to the Mayor October 1 1948 at his request by the Citizens Budget Commission, Inc., in its 40 pages of discussion nowhere mentions incidental vehicular advertising as a

the trucks involved in this appeal occasioned any congestion or impediment to traffic.

The discrimination made by the courts below between the prohibited "advertising" and the permitted "business notices" is unreasonable and arbitrary, as we shall show (p. 24 below). But even an enactment fair on its face, if applied and administered by public authority in a manner which is in itself unreasonable or which fails to accomplish the reasonable objects intended, is to that extent outside the police power. *Yick Wo* v. *Hopkins*, 118 US 356, 373; *Collins* v. *New Hampshire*, 171 US 30; cf. *Kotch* v. *Pilot Commissioners*, 330 US 552, 557. Even the existence of abuse incident to an occupation ordinarily useful is not enough to justify abolition when regulation may suffice.[14]

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hindrance to traffic. Regarding the carriage of goods by appellant Railway Express and others this report says, pp. 33-4: "Roughly two-thirds of the merchandise freight entering and departing from the City of New York is motor carried. In addition, trucks handle practically all intra-city freight movement. Any substantial curtailment of the movement of the trucks into, out of and within the City, as the recent trucking strike demonstrates, immediately threatens the economic life of the community and endangers the lives of its residents.

The vast volume of freight moved daily by motor truck in the City creates a traffic problem of major scope and complexity. Two aspects of this problem, critical in their impact upon congestion in a number of important areas in the municipality are: (1) the great volume of loading and unloading operations conducted on the streets and sidewalks, and (2) the heavy use of main thoroughfares of the City for pick-ups and deliveries by large inter-city trucks and tractor-trailer combinations."

Simple common sense suggests that this problem is in no way affected by the nature of the *publicity on the sides of the trucks.*

[14] *Meyer* v. *Nebraska*, 262 US 390, 403; *Adams* v. *Tanner*, 244 US 590, 594; *Pierce* v. *Society of Sisters*, 268 US 510; *Ribnik* v. *McBride*, 277 US 350; *Brazee* v. *Michigan*, 241 US 340; *Weaver* v. *Palmer Bros.*, 270 US 402.

This principle was applied in *Saia* v. *New York*, 334 US 558, where this Court declared invalid an ordinance of the City of Lockport forbidding the use of sound-amplification devices by which sound is cast directly upon the streets and public places, except with permission of the chief of police, for the exercise of whose discretion no standards were prescribed. A majority of the Court in that case thought that the ordinance violated the constitutional right of free speech. Although four justices dissented in varying degrees having regard to the particular circumstances under which the sound-amplifying device was to be used, the majority said by Mr. Justice Douglas (334 US at 562):

> "The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here."

We recognize that this result followed to some extent from the preferred position to which the Court thought the freedoms of the First Amendment were entitled (334 US at 562). But under the Fourteenth Amendment also appellants' right to pursue a legitimate business or occupation "ordinarily useful", and the right of individual advertisers and the public generally to enjoy the advantages of that business are entitled to protection against the complete prohibition which is attempted here in the name of traffic control. Here even more than in the *Saia* case a flat and outright prohibition has been imposed without even an attempt at regula-

tion. The traffic rule under which appellants have been convicted discloses no effort to control or limit the size, type, color or other qualities of publicity to be carried in vehicular traffic. The construction adopted below simply prohibits advertising of any description whatever while sanctioning business notices of any description whatever. We have called attention (p. 11 above) to the form of regulation which, under municipal ordinance, New York City has applied to types of commercial publicity far more clamorous in their calls upon public attention and much more conducive to traffic congestion than anything which a Railway Express truck could conceivably exhibit on its side walls. No administrative control of that kind has been tried with vehicular advertising in New York City. Instead the rule promulgated by the Police Commissioner on the basis of his authority *over traffic* has been enlarged by interpretation below so as to become outright destruction of a legitimate commercial activity.

The cases relied upon for respondent below do not support the constitutionality of § 124 as thus construed. *General Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 193 NE 799, appeal dismissed 296 US 543, 297 US 725, involved no question of traffic control, and turned on the fact that Article 50 of the Commonwealth's Constitution as amended in 1918 authorized regulation by statute of advertising on private property. Recognition of the State's control over its own highways (*South Carolina State Highway Department* v. *Barnwell Bros.*, 303 US 177) does not sanction the complete prohibition of an activity thereon which does not in reality impinge on or affect the use of the highways. *Valentine* v. *Chrestensen*, 316 US 52, which respondent cited to the Court of Appeals, dealt with a sanitary regulation (viz. New York City Sanitary Code § 318), not

with a traffic regulation. The provision there in question forbade distribution in the streets of commercial and business advertising matter. The defendant Chrestensen claimed the right to distribute in the city streets a handbill advertising a submarine which he had moored in the East River and was exhibiting for profit. The issue before the Court was whether the conceded right to circulate the protest which defendant had printed on one side of the handbill carried with it the right to distribute advertising in a manner forbidden by the Sanitary Code. The Court held that it did not. No traffic regulation was involved, but only the conceded right of the City to maintain cleanliness in the streets. Here no question of sanitation arises. It is in the guise of traffic control alone that (as the courts below view § 124) the Commissioner has undertaken to prohibit advertising on all vehicles, while sanctioning business notices on all vehicles. This prohibition we say, entirely apart from the discrimination involved, has no reasonable relation to his use of the delegated power.

The courts below would not, we believe, have come to this unconstitutional construction of § 124 were it not for the previous decision of this Court in *Fifth Avenue Coach Company* v. *City of New York*, 221 US 467 (1911), affirming 194 NY 19 (1909), which was erroneously urged upon the lower courts as controlling them. The *Fifth Avenue Coach* case was a suit in equity to enjoin enforcement of a *municipal ordinance* (not a traffic regulation promulgated by an administrative official) containing substantially the same language as Traffic Regulations § 124.[15] Hence there was

[15]The text of the ordinance is set forth in the opinion of this Court, 221 US at 477. Comparison of § 124, p. 2 above, will show that in its present form the provision has been slightly modified. The courts below, however, in their construction of the language attached no significance to the change.

at no time involved the question now first presented whether the complete prohibition of vehicular advertising or the attempted discrimination between such advertising and business notices, is a lawful and proper exercise of that power of traffic control upon which alone § 124 can rest and by which it is limited. A prohibition which was previously sustained by this Court as the proper exercise of the legislative authority of the City over street advertising (221 US at 484), must now rest upon the relationship of the Police Commissioner's edict to traffic control.[16]

Moreover, the corporate plaintiff in the *Fifth Avenue Coach* case was held by the State courts, in a manner deemed conclusive here (221 US at 481-2), not to have power under its charter to carry the advertising prohibited by the ordinance. That was in reality the end of the question for the purposes of this Court (221 US at 482, 483):

> "And this, we think, is enough for the decision of the case. . . . Necessarily, if plaintiff had no right under its charter to use its stages for advertising purposes, or if the ordinance of the city was a proper exercise of the police power, plaintiff was not deprived of its property without due process of law, which is the basis of its second contention."[17]

That the *Fifth Avenue Coach* case did not involve the validity of a traffic regulation as such, is again made clear by the fact that at the time of that decision there was in

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[16]The Court of Appeals found specific authority for the municipal ordinance in § 50 of the City Charter then in force (194 NY at 27-8). This authorized the board of aldermen "to regulate the exhibition of advertisements". The ordinance previously sustained by this Court was a local advertising law, not a local traffic law, much less an administrative regulation.

[17]These were the grounds upon which dismissal of the suit was based in the lower New York courts. 58 Misc. 401, 403, 411, 429; 126 AD 657.

force in New York State the Motor Vehicle Law, L. 1904 ch. 538, which repealed all municipal traffic ordinances and gave the State exclusive power to pass traffic laws, except that municipalities might regulate the speed of motor vehicles and might also regulate motor vehicles offered to the public for hire. The situation is described in *City of Buffalo* v. *Lewis*, 192 NY 193, 199, decided by the same bench that decided the *Fifth Avenue Coach* case; Judge Chase wrote both opinions. Aside from every other distinction between the *Fifth Avenue Coach* case and this, the vehicular advertising there affected by the ordinance and denied protection in equity ran along the most fashionable and perhaps the most frequented avenue in Manhattan (see 58 Misc. at 409-10), whereas the traffic regulation applied to the present appellants strikes down vehicular advertising on every street and avenue of the five boroughs.

Limited as it is by the radically different record and statutory scheme which the *Fifth Avenue Coach* case presented, the opinion of this Court rendered therein in 1911 has no real bearing upon the present appeal, although it was urged by respondent upon the courts below as conclusive. The majority in the Court of Appeals apparently did not so regard it, since they did not even so much as cite the case as authority for their affirmance without opinion.

If there were a similarity between the cases, however, the change in circumstances since 1911 has been so great as to warrant a reconsideration by this Court of the principles involved. A prohibitive restriction on motor vehicle advertising thought to be reasonable in 1911, may very well be unreasonable today. At the time of the decision of the New York courts in the *Fifth Avenue Coach* case, motor vehicles were a novelty (*City of Buffalo* v. *Lewis*,

192 NY 193, 199). The stages of the Fifth Avenue Coach Company were drawn by horses up to 1907 (194 NY at 26). In 1909, when the Court of Appeals decided the *Fifth Avenue Coach* case, the total motor vehicle production in the United States was only 127,731 units. Motor trucks were at that time unknown, and as late as 1911 only 10,681 motor trucks were produced in the United States.[18] Commercial truck production did not arise in any volume until almost a decade after the *Fifth Avenue Coach* decision. At the time of that decision automotive advertising in its present form and ubiquitousness was hardly dreamed of; the advertisements and notices which are today an accepted detail of motor vehicles did not until well after the *Fifth Avenue Coach* decision acquire the volume and importance of a new industry.[19]

The highest courts of many of the States have stricken down as a denial of due process statutory provisions which prohibit where regulation might suffice. *People* v. *Thillens*, 400 Ill. 224, 79 NE 2d 609 (1948; Illinois Community Currency Exchange Act held unconstitutional as applied to operation of a fleet of armored trucks); *City of Mt. Sterling* v. *Donaldson Baking Co.*, 287 Ky. 781, 155 SW 2d 237 (1941; ordinance forbidding solicitors, peddlers, etc. to approach private residences held an improper exercise of police power); *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959 (1927; statute prohibiting newspaper advertising of cigarettes held improper exercise of police power); *Carolene Products Co.* v. *Thomson*, 276 Mich. 172, 267 NW 608 (1936; statute prohibiting addition to milk of fat or

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[18]Encyclopedia Britannica, 14th ed. vol. 15 p. 881.

[19]In 1945 the advertising contracts here involved were estimated to be worth $360,000 a year to Railway Express Agency, Inc. (R. 106).

oil other than milk fat held unconstitutional as applied); *Regal Oil Co.* v. *State*, 123 NJL 456, 10 A 2d 495 (1939; statute prohibiting certain signs for public display by retail motor fuel dealers held invalid exercise of police power); *O'Mealia Outdoor Advertising Co.* v. *Borough of Rutherford*, 128 NJL 587, 27 A 2d 863 (1942; ordinance prohibiting outdoor billboard advertising held abuse of police power; *Balesh* v. *City of Hot Springs*, 173 Ark 661, 293 SW 14 (1927; ordinance prohibiting sales at auction held invalid); *Inglis* v. *Rymer*, 113 Fla. 732, 152 So. 4 (1934; city ordinance prohibiting skating rink where fee is charged held abuse of police power); *Prior* v. *White*, 132 Fla. 1, 180 So. 347 (1938; ordinance prohibiting solicitation of orders for goods on private property held outside police power).

The precise point presented to this Court came before the Supreme Court of Nebraska in *State* v. *Hind*, 143 Neb. 479, 10 NW 2d 258 (1943), involving an ordinance of the City of Lincoln substantially identical with Traffic Regulations § 124. Defendant was driving his automobile upon the city streets in the ordinary course of his business, but carried on the outside of his car notices advertising the time and place of a religious meeting. The Nebraska court thus described the ordinance (143 Neb. at 480):

> "It is evident that this ordinance was intended as a traffic control measure. Its purpose is to prohibit the use of the streets of the city to those engaged primarily in advertising activities. The city clearly has the right by ordinance to prescribe reasonable regulations for the control of traffic on its streets as a matter of public safety. In so doing, we think it can properly prohibit vehicles engaged primarily in advertising schemes from driving up and down its

streets and thereby adding to the traffic load and the danger of injury to the public."

The court went on to say on the facts that the defendant's advertising was incidental to the use of the car, which was "no different than that of a business car carrying the advertising of its owner", and indicated as follows the limitations placed upon its interpretation by constitutional requirements (143 Neb. at 481):

> "It will be noted that the ordinance also provides that the use of business notices upon ordinary business vehicles is not prohibited so long as the vehicle is used in the usual business or regular work of the owner. It is evident, therefore, that where the use of the vehicle as an advertising medium was incidental to its ordinary use by its owner, and did not, because of such use as an advertising medium increase traffic or the hazards of the public in the use of the streets, no prohibition was intended. *The ordinance, thus interpreted, is not arbitrary nor unreasonable, and constitutes a valid exercise of the police power by the municipal authority.*" (italics supplied)

It is the constitutional limitation so indicated by the Nebraska court which the majority in the New York court disregarded. The construction of § 124 adopted below violates the principle that an exercise of police power, to be valid, must be reasonably calculated to achieve a legitimate public purpose—in this instance traffic control. If a regulation "purporting to be enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge." *Mugler* v. *Kansas*, 123 US 623, 661; *Liggett Company* v. *Baldridge*, 278 US 105, 113.

2. *Equal Protection of the Laws.* Furthermore the classification made by the lower courts between "advertising" and "business notices" is arbitrary and unreasonable, and denies equal protection of the laws. Traffic Regulations § 124 contains no standards for differentiating between the permitted business notices and the prohibited advertising. In standard usage there is no difference between the ideas. Webster's New International Dictionary (1939 ed.) defines *advertise* in terms of public notice, and defines *advertising*:

> "Any form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc., in the promulgation of a doctrine or idea, in securing attendance, as at a meeting, or the like."

In the absence of a clear distinction in § 124 between the permitted publicity and the forbidden publicity, it might as a criminal enactment be void for uncertainty (*Winters* v. *New York*, 333 US 507) were it not for the construction furnished by the courts below to the effect that publicity concerning one's own business is permitted and publicity concerning the business of others is forbidden.[20]

But this distinction is meaningless in relation to the basic problem of traffic control. The Court will take judicial notice[21] that displays advertising the business of truck own-

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[20]The courts below seem to have felt bound by the construction of the somewhat similar language in the prior ordinance, which the Court of Appeals adopted in the *Fifth Avenue Coach* case, 194 NY at 26-7: "The second sentence of the ordinance is a part of the same paragraph and the two sentences read together show the intention of the legislative body. . . . General advertising for hire is by the ordinance prohibited whether carried on wagons wholly used for advertising or in connection with the ordinary or usual business in which the wagons are engaged."

[21]*Ah Kow* v. *Nunan*, 5 Sawy. 552; *Brown* v. *Piper*, 91 US 37.

ers (*i.e.* "business notices") are just as large, bold and lurid as any commercial advertising. Coca-Cola trucks delivering the syrup may advertise the business of the owner with the brightly painted slogan "Drink Cola-Cola". The New York World-Telegram may carry on the side of its news trucks a poster similar in every way to a Railway Express poster with a picture of Kay Summersby and the title of her serial story "Eisenhower Was My Boss" in gigantic capitals, provided the whole is underwritten with the name of the newspaper owner. At the moment the New York Post displays on its delivery trucks a large poster calling attention to a writer in that newspaper, with the legend in enormous letters:

> "Sylvia Porter says . . .
> SULPHA DRUGS HAVE NOT YET
> BEEN DEVELOPED FOR ECONOMIC
> ILLS"

This forsooth is a "business notice", in the view of the Police Commissioner which has received approval below.

The self-advertising permitted by the interpretation of § 124 which strikes down the advertising of appellants goes very much further. The Court may judicially notice the delivery vehicles which attract attention by their design. Thus Borden's sometimes delivers its milk in white trucks shaped like milk-bottles inscribed "Borden's Golden Crest". A roving replica on wheels of one of the cottage-like "Chock Full O'Nuts" shops reminds the man in the street to drop in for a pound of pistachios. A package of Life-Savers on wheels delivers that confection and also advertises its merits.

There is no conceivable distinction for traffic purposes between a Railway Express truck advertising Camel cig-

arettes and a National Biscuit Company truck urging the public by pictorial representations and slogans painted on its sides, to eat Uneeda Biscuits. There is no distinction, for that matter, between a Railway Express truck advertising radio station WOR (like that described in one of the underlying summonses, R. 95) and the same truck displaying a poster of the same size "Ship by Railway Express". Yet the latter is permissible under the interpretation below as a business notice, while the former is forbidden as advertising.

It is impossible to justify the discrimination thus made between self-advertising and the advertising of others, in relation to the Railway Express delivery trucks, on the theory that advertising for hire brings in an additional commercial incentive which may tend to increase the number of delivery vehicles and vehicular advertisements on the streets. No such explanation could stand upon the present record, which shows conclusively (p. 3 above) that the number of trucks operated by appellants and the delivery routes are determined wholly by the requirements of the freight carried and not in any respect by the incidental advertising displays.

Hence the classification attempted by § 124 as construed below is entirely unreasonable. It treats with an inequality not justified by the avowed purpose of § 124, viz. traffic control, self-advertising and the advertising of products of others. *Central Lumber Co.* v. *South Dakota*, 226 US 157, does not, as one of the courts below erroneously asserted,[22] sustain a distinction, for purposes of control of vehicular traffic, between general advertising for profit and business notices. The *Central Lumber Company* case

[22]The Appellate Part of Special Sessions, 67 NYS 2d at 736.

involved a South Dakota statute which dealt equally with the entirety of the class in relation to the object sought to be obtained, i.e. prohibition of discriminatory sale prices. Section 124 as interpreted does not deal equally with the entire class of publicity displayed by vehicular traffic; it has been interpreted in such a manner as to eliminate paid advertising only. As such it is unreasonably discriminatory in relation to the problem of traffic control with which the Police Commissioner purported to deal in promulgating § 124, and is therefore void.[23]

We see no difference in principle and little in point of fact between § 124 and the statute declared invalid in *Smith* v. *Cahoon*, 283 U S 553, which required those who operated on the highways in the transportation of goods for hire to furnish a bond or insurance policy for the protection of the public against injuries through negligence in such operation, but which did not apply to those "engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." The following language of the Court in the *Cahoon* case is equally in point here (p. 567):

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[23] *Royster Guano Company* v. *Virginia*, 253 US 412; *Power Manufacturing Co.* v. *Saunders*, 274 US 490, 493; *Louisville Gas & Elec. Co.* v. *Coleman*, 277 US 32, 37-38; *Smith* v. *Cahoon*, 283 US 553, 556, 557; *Iowa-DesMoines Nat. Bank* v. *Bennett*, 284 US 239; *Borden's Co.* v. *Baldwin*, 293 US 194, 210; *Nashville C. & St. L. Ry.* v. *Walters*, 294 US 405, 429, 432; *Mayflower Farms* v. *Ten Eyck*, 297 US 266; *Hartford Co.* v. *Harrison*, 301 US 459, 461, 462.

> "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made'."[24]

Point II

SECTION 124, AS CONSTRUED AND APPLIED BELOW, IS A DIRECT AND UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF ARTICLE I, SECTION 8 OF THE CONSTITUTION.

It will not be disputed that Railway Express and the trucks which it operates, including those in the City of New York, are engaged in the delivery of goods in interstate commerce. *People* v. *Horton Motor Lines,* 281 NY 196 (1939). The advertisements are displayed in performance of a nation-wide contract involving interstate transportation and publication, and thus constitute an interstate advertising enterprise. *Adams Express Co.* v. *New York,* 232 US 14.

By force of § 124 the Police Commissioner is attempting in effect to compel Railway Express to abandon, in the City of New York, the display of advertising on its motor vehicles engaged in interstate commerce as a condition to conducting, in that city, its interstate business of expressage of goods. And this regulation applies only to the New York operation of Railway Express. In the State of Nebraska

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[24] *Smith* v. *Cahoon* was cited with approval by this Court as recently as *Winters* v. *New York,* 333 US at 516 (1948).

substantially the same language in the form of a municipal ordinance is held, partly on constitutional grounds, not to extend to the incidental display of advertising. *State* v. *Hind*, 143 Neb. 479, 10 NW 2d 258. In the City of Hartford, Connecticut, substantially the same language in Hartford ordinances subsection 19-21(a) is held not to govern the display of advertising by Railway Express in the manner shown by this record. *State of Connecticut* v. *Henry Cody and Samuel Chesney*, Hartford (Conn.) Police Court, May 28 1946 (unreported).

A so-called local "traffic regulation" having this far-reaching prohibitive incidence on interstate commerce, is clearly violative of Article I § 8 of the Constitution. For, if this absolute prohibition may accurately be called a "burden" merely, then here the burden is direct and extreme in its destructive effect. Since the regulation is not an appropriate exercise of the local police power, the lack of justification for its direct prohibitory effect on interstate commerce is complete.

But even if there were a real and substantial relation between § 124 and traffic control, and even if it were a reasonable intra-state traffic control measure, the resultant impact on subjects and instrumentalities of interstate commerce invalidates it. While exertion of the police power essential for the protection of the local community may extend incidentally to the operations of interstate commerce, the police power does not justify the imposition of direct burdens on interstate commerce nor its subjection to unreasonable demands.[25]

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[25] *Smith* v. *Alabama*, 124 U. S. 465; *N. Y., N. H. & H. R. Co.* v. *New York*, 165 U. S. 628; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310; *Southern Pacific Ry.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373.

As the late Justice Hughes said in *Adams Express Co.* v. *New York*, 232 US 14, 31:

> "Local police regulations cannot go so far as to deny the right to engage in interstate commerce or to treat it as a local privilege and prohibit its exercise in the absence of a local license."

In the *Adams Express* case, the Court declared invalid an ordinance of the City of New York requiring a license for the operation within the city of express delivery wagons employed in interstate commerce. Attempt was made to sustain the law as a safety precaution appropriately taken under the police power. The Court did not hold that, in its intra-state effects, the ordinance was arbitrary or capricious, but based the declaration of unconstitutionality upon the prohibitive effect of the license requirement on interstate commerce. We perceive no substantial difference between the exaction by a municipal legislature of a license as a condition to operating in interstate commerce within a city, and a policeman's edict that one may not engage, inside the municipality, in the interstate carriage of goods unless he also discontinues, inside the city limits, the interstate business of vehicular advertising.

This case falls within the rule of the decision in *Southern Pacific Co.* v. *Arizona*, 325 US 761, invalidating as an undue burden on interstate commerce an Arizona statute making it unlawful to operate within the State a passenger train of more than 14, or a freight train of more than 70, cars. The regulation, as the Court found, had a serious adverse effect on transportation efficiency and economy, and at the same time it did not appear that the enactment would lessen materially the danger of accidents within the State.

The late Chief Justice Stone said for the majority of the Court (325 US at 767):

> "But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

Following the *Southern Pacific* case, the Court in *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, held unconstitutional as an undue burden on interstate commerce a Virginia statute requiring all passenger motor carriers, both interstate and intra-state, to separate white from colored passengers so that contiguous seats would not be occupied by persons of different color at the same time. Congress had not legislated with respect to the racial segregation of passengers on motor vehicles in interstate commerce, and the question was presented how far local authority may exercise its police power over a subject of interstate commerce in the absence of Federal regulation.

After stating the general proposition that "where Congress has not acted, state legislation is . . . invalid which materially affects interstate commerce," the majority of the Court said (328 US at 377):

> "The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond

state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation."

Applying these principles to the Virginia statute, the majority opinion continued (328 US at 386):

"As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulation, for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel."

Concurring opinions cited as controlling *Hall* v. *De Cuir*, 95 US 485. Justice Black cited that case as holding that uniformity in the regulations by which a carrier is to be governed "from one end to the other of his route is a necessity in his business", and that it is the responsibility of Congress, not the States, to determine "what such regulations shall be". 328 US at 388.

Under the rule of the *Southern Pacific* and *Morgan* decisions the instant case presents an enactment plainly outside the local police power. If this "traffic regulation" may

legally be made by a municipal police commissioner, certainly statutes of like tenor may be constitutionally passed by every State legislature in the land. The net result would be the imposition of a State-created but nation-wide restraint upon the right to conduct interstate commerce—a condition which, unless complied with, would in effect destroy the right to carry goods interstate by railway express, and which, if complied with, would abolish altogether the right to advertise by interstate vehicular display. This is not therefore a case where determination of the validity of the local law involves a delicate balancing of national against local interests. For the local regulation is such that, as against it, the national interest cannot survive.

But we need not go so far as to assume the adoption by all the States and all their municipalities of similar prohibitive "traffic regulations". The supposition that only some of them might do so is enough to condemn such legislation. In that event, the movement of the corporate appellant's trucks from State to State and from city to city would be seriously impeded, involving the removal of the advertisements upon entering a State or municipality having such legislation and their restoration upon entering one not so legislating. There would thus become applicable the reasoning which the Court employed in the *Southern Pacific* case (325 US at 773):

> "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other

> states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state . . . With such laws in force in states which are interspersed with those having no limit on train lengths, the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident."

Consequently, it is evident that if vehicular display advertising by an interstate carrier is to be prohibited or regulated, the prohibition will have to be universal or the regulation will have to be uniform, and either result will have to flow from Congressional action.

In the *Southern Pacific* case, the Court found that the practical effects of the statute were such as to interpose "a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding § 1, 54 Stat. 889." 325 US at 773. A similar policy with respect to interstate motor vehicle transportation has been declared by Congress in the Motor Carrier Act.[26] And this Court has noted that in that legislation "Congress sought to set out its purpose and the range of its action in a declaration of policy which covered the preservation and fostering of motor transportation in the public interest, tariffs, the coordination of motor carriage

[26]Title 49 U. S. C. A. §§ 301-327.

with other forms of transportation and cooperation with the several states in their efforts to systematize the industry"; and "efficient and economical movement in interstate commerce is obviously a major objective of the Act."[27]

New York Traffic Regulations § 124 constitutes a substantial obstruction to the policy thus declared. Many of the trucks of Railway Express, in their carriage of goods and advertising in interstate commerce, run constantly in and out of New York State to and from the four railheads in the State of New Jersey (R. 48). None of them is confined in its operations to New York City or New York State. All of them, as the demands of freight require, traverse the highways of New York and other States, and in the process necessarily pass through various cities, towns and villages. Eighty percent. of the merchandise carried by the corporate appellant in the 1,900 trucks here immediately involved moves in interstate commerce (R. 83).

The contract under which they display advertising is nation-wide and calls for such display in various parts of the country (R. 106). If the Police Commissioner of the City of New York may prohibit such advertising under penalty of closing the highways within that city to the trucks, then every city, town and village in the United States, through either its legislature or its lesser administrative officials, may do likewise. Railway Express would then have to abandon its interstate vehicular advertising altogether, and could continue that advertising only if a sufficient number of local communities elected not to bar the posters from the trucks. Even then, Railway Express would be confronted

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[27] *United States* v. *American Trucking Assns.*, 310 U. S. 534 (1940); and see *Maurer* v. *Hamilton*, 309 U. S. 598, 606 (1940); *Motor Carrier Act*, § 202, 49 U. S. C. A. § 302.

with the necessity of equipping its vehicles with adjustable advertising sides, to be put on or taken off as local laws might require, and to supply its drivers with detailed information as to the state of the law in all the cities, villages, towns and hamlets along the interstate routes.

Such arrangements, of course, would be a practical impossibility. As a consequence, and by compulsion of purely local "traffic regulations", such interstate advertising would have to be abandoned altogether, and an interstate business, legitimate outside the prohibiting localities, would nevertheless be completely destroyed.

It is submitted that a local regulation having such far-flung extra-territorial consequences is not a permissible traffic rule, but is legislation which flies in the face of declared Congressional policy with respect to the "efficient and economical movement in interstate commerce" of motor vehicle transportation.

As § 124 constitutes a "substantial obstruction" to the policy thus declared, it may not be permitted to stand in the way of that policy. *Southern Pacific Co.* v. *Arizona*, 325 US 761. The Court is here presented, not with a local safety regulation, like the limitation of weight and width of motor trucks involved in *South Carolina Highway Department* v. *Barnwell Bros.*, 303 US 177 (note like instances cited, 303 US at 189), but with a prohibition of vehicular advertising logically and realistically unrelated to the control of local traffic which is its only foundation.

CONCLUSION

The judgments of conviction should be reversed and the summonses dismissed.

Respectfully submitted,

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